

Conversation Contents

Fw: FYI - Bristol Bay Assessment in today's Inside EPA

Butler.Barbara@epamail.epa.gov

From: Butler.Barbara@epamail.epa.gov
Sent: Tue Jul 31 2012 13:51:24 GMT-0600 (MDT)
To: rseal@usgs.gov
Subject: Fw: FYI - Bristol Bay Assessment in today's Inside EPA

----- Forwarded by Barbara Butler/CI/USEPA/US on 07/31/2012 03:47 PM -----

From: Palmer Hough/DC/USEPA/US
To: Bob Sussman/DC/USEPA/US@EPA, Dennis McLerran/R10/USEPA/US@EPA, Nancy Stoner/DC/USEPA/US@EPA, Denise Keehner/DC/USEPA/US@EPA, evans.david@epa.gov, Russell Kaiser/DC/USEPA/US@EPA, peck.gregory@epa.gov, Matthew Klasen/DC/USEPA/US@EPA, Ken Kopocis/DC/USEPA/US@EPA, Gautam Srinivasan/DC/USEPA/US@EPA, Heidi Nalven/DC/USEPA/US@EPA
Cc: aicher.rebecca@epa.gov, Barbara Butler/CI/USEPA/US@EPA, Bill Dunbar/R10/USEPA/US@EPA, Cara Steiner-Riley/R10/USEPA/US@EPA, Christopher Hunter/DC/USEPA/US@EPA, Dave Athons/R10/USEPA/US@EPA, David Allnutt/R10/USEPA/US@EPA, Glenn Suter/CI/USEPA/US@EPA, Hanady Kader/R10/USEPA/US@EPA, Heather Dean/R10/USEPA/US@EPA, Heidi Nalven/DC/USEPA/US@EPA, Jason Todd/DC/USEPA/US@EPA, Jeff Friithsen/DC/USEPA/US@EPA, Jenny Thomas/DC/USEPA/US@EPA, Jim Wigington/COR/USEPA/US@EPA, Joe Ebersole/COR/USEPA/US@EPA, Judy Smith/R10/USEPA/US@EPA, Julia McCarthy/R8/USEPA/US@EPA, Kate Schofield/DC/USEPA/US@EPA, Marianne Holsman/R10/USEPA/US@EPA, Mary Thiesing/R10/USEPA/US@EPA, Michael Szerlog/R10/USEPA/US@EPA, Palmer Hough/DC/USEPA/US@EPA, Phil North/R10/USEPA/US@EPA, Rachel Fertik/DC/USEPA/US@EPA, Richard Parkin/R10/USEPA/US@EPA, Sheila Eckman/R10/USEPA/US@EPA, Tami Fordham/R10/USEPA/US@EPA
Date: 07/31/2012 02:13 PM
Subject: FYI - Bristol Bay Assessment in today's Inside EPA

<http://insideepa.com/201207312406057/EPA-Daily-News/Daily-News/industry-says-epa-bristol-bay-study-will-not-back-threatened-permit-veto/menu-id-95.html>

July 31, 2012

Daily News

Industry Says EPA Bristol Bay Study Will Not Back Threatened Permit Veto

Posted: July 31, 2012

Industry and other supporters of the controversial Pebble Mine slated for Bristol Bay, AK, are warning that regardless of whether EPA enjoys authority to issue a novel preemptive veto of the

project's permit as some critics are urging, the agency's landmark assessment of the mine's potential impact on the bay watershed is inadequate as the sole basis for such a veto.

"EPA runs the risk of engaging in unlawful, arbitrary decisionmaking if it relies on the Assessment alone to determine that mining should or should not be allowed in the Bristol Bay watershed prior to the submission of an application for any specific mining proposal," attorney Daniel Himebaugh, of the Pacific Legal Foundation (PLF), writes in [July 11 comments](#).

The Bristol Bay study includes an ecological risk assessment of the planned Pebble Mine, a massive hardrock mine that opponents say would have severe adverse impacts on nearby salmon fisheries, among the largest in the world.

Local tribal leaders and environmentalists have called on EPA to exercise its authority under section 404(c) of the Clean Water Act (CWA) to withdraw the project's disposal specifications even before a permit is sought. EPA has rarely exercised the authority for already issued permits and never for a project before a permit is sought.

But the [agency has indicated](#) in correspondence with lawmakers and in a recent appellate court filing on the issue that it believes it enjoys such authority. "By allowing EPA to withdraw 'specifications' as opposed to permits . . . Congress gave EPA authority to review every specification of a disposal site, whether or not a permit is required to discharge fill into that site," the agency said in briefings in a pending appeal of a veto.

Rather than acting on calls for the novel veto in this case, the agency launched the study. The draft that EPA released earlier this year found that the normal operation of a mine and supporting infrastructure on the scale discussed by the developers would lead to "significant impacts on fish populations in streams surrounding the mine site." The draft is slated for review in a series of peer review meetings in Alaska Aug. 7-9.

Activists have hailed the study as a necessary step in determining whether the agency should preemptively veto the mine by exercising its 404(c) authority.

But supporters of the mine have argued that a first-time preemptive veto would overstep EPA's authority under 404(c), which they say only allows the agency to withdraw sites from specification after a permit application has been submitted.

PLF's Himebaugh, for example, pointed to the recent district court ruling in Mingo Logan Coal Company v. United States Environmental Protection Agency, which the agency is now appealing, where the lower court held that EPA's veto power expires when a project receives its final discharge permit under section 404.

Were EPA to issue a veto under section 404(c), it would be considered "final administrative action" subject to the Administrative Procedure Act, which forbids executive agencies from taking "arbitrary and capricious" action even when they do not otherwise exceed their lawful authority.

As a result, claims by the mine's supporters that the draft watershed study is inadequate as the sole basis for a veto suggests a line of argument they would make were the agency to withdraw its specifications.

Industry's Comments

In their comments, members of the mining industry, along with representatives of the Alaska state government, argue that EPA based its analysis of the potential environmental hazards of a mine on hypothetical scenarios and estimated mine footprints, dam sizes and technology levels, while ignoring the mine partnership's "Environmental Baseline Document" analyzing the potential impacts of hardrock mining on its economy and wildlife.

The assessment "creates a straw-man that can be used to reach regulatory decisions on a not-yet-proposed project," says Rex Rock, president of the mining company Arctic Slope Regional Co., in [July 20 comments](#).

And Michael Chenault (R), speaker of the Alaska House, warned in a [July 12 letter](#) that "the hastily prepared draft Bristol Bay Watershed Assessment, the unnecessarily rushed public review process, and serious flaws in the scientific methods relied upon in the draft assessment only serve to continue to undermine the validity of the entire undertaking."

In [a comment](#) directed at the agency's peer-review panel, Ronald Thiessen, CEO of Northern Dynasty, a major stakeholder in the Pebble Partnership, says the assessment failed to consider mitigation technology likely to be used by a large-scale mine, saying reviewers should question whether the assessment "reasonably consider[s] the likely required fail-safe measures incorporated into design and operation of a modern hard-rock mine-mill complex."

While comments from mine opponents -- a group that includes environmentalists, native communities and sportsmen's organizations -- praise the report and urge EPA to issue a speedy 404(c) veto, they rarely make a legal case for the agency's ability to proceed with such a veto, at most urging regulators to make sure they are on sound legal footing.

"We strongly recommend that the final report include an Agency denial of use of the area because of unacceptable adverse effects on fishery areas (including spawning & breeding) under Section 404c of the Clean Water Act, and (2) an explicit explanation of the legal bases for that denial in light of the science included in the report," says Dave Ward, president of the American Fisheries Society's western division, in [July 21 comments](#). -- *David LaRoss* ([<u>dlaross@iwpnews.com](mailto:dlaross@iwpnews.com))
This e-mail address is being protected from spambots. You need JavaScript enabled to view it)

Related News: [Water](#)

Palmer Hough, Environmental Scientist
tel: 202.566.1374 | fax: 202.566.1375

Wetlands Division
U.S. EPA Headquarters (MC 4502T)
1200 Pennsylvania Avenue, NW
Washington, DC 20460
www.epa.gov/wetlands